Calendar No. 97

98TH CONGRESS, 1st Session | SENATE | REPORT No. 98-61

COAL DISTRIBUTION AND UTILIZATION ACT OF 1983

APRIL 19 (legislative day, APRIL 18), 1983.—Ordered to be printed

Mr. MCCLURE, from the Committee on Energy and Natural Resources, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 267]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 267) entitled the "Coal Distribution and Utilization Act of 1983", having considered the same, reports favorably thereon with an amendment to the text and recommends that the bill (as amended) do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Coal Distribution and Utilization Act of 1983".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress hereby finds and declares that—

(1) the continuing dependence of the United States on foreign sources for petroleum and petroleum products entails grave national security risks, results in major balance-of-payment deficits, and increases in inflation and unemployment in the domestic economy;

(2) United States possesses extensive coal reserves that must be produced, distributed, and utilized to reduce the Nation's dependence on imported petroleum;

(3) domestic coal reserves cannot be developed and used for fuel unless adequate transportation systems and facilitites exist for the efficient and economic distribution of large quantities of coal to markets in interstate and foreign commerce at competitive prices across great distances;

(4) the Nation's coal distribution system must include interstate coal pipeline distribution systems that will assist the Nation to develop efficiently and use its coal resources;

(5) the construction of interstate coal pipeline distribution systems to distribute domestic coal will be faciliated by granting the power of eminent domain to certain interstate coal pipeline distribution systems;

11-010 O

S313-13

(6) the construction of interstate coal pipeline distribution systems is a beneficial public use that justifies granting the Federal power of eminent domain to those sytems for which a determination of national interest has been made pursuant to this Act;

(7) the water resources of the States are necessary for the development of other resources within those States, and State water laws or terms and conditions of permits and authorizations for the appropriation, use, and diversion of water that restrict, limit, or condition the export of water in interstate coal pipeline distribution systems are reasonable and permissible means for the protection of the resources and the public interests of States notwithstanding any adverse impact such law may have on interstate commerce;

(8) State water law and interstate compacts are carefully balanced and structured systems for the allocation of water;

(9) the national interest is best served by developing interstate coal pipeline distributioin systems pursuant to those State water laws, interstate compacts, and laws governing the interstate allocation of water, including laws relating to or prohibiting the export or use of water within or outside the State granting or denying such export or use, notwithstanding any adverse impact such law may have on interstate commerce; and

(10) the need for a national coal distribution system is subservient to the national interest in the primacy of State water law, interstate compacts, and laws governing the interstate allocation of water.

(b) The purpose of this Act is to facilitate the development of interstate coal pipeline distribution systems by granting the Federal power of eminent domain to those interstate coal pipeline distribution system that are determined to be in the national interest: *Provided,* That such development is subject to State water law, interstate compacts, and laws governing the interstate allocation of water, notwithstanding any potential burden on interstate commerce.

DEFINITIONS

SEC. 3. For the purposes of this Act the term—

(1) "coal" means any of the recognized classifications of coal, including anthracite, bituminous, semibituminous, subbituminous, and lignite;

(2) "interstate coal pipeline distribution system" means any pipeline system the primary economic purpose of which is the distribution of coal in a liquid or solid state, but in no event may a purpose be the distribution of water, whether alone or mixed with other substances—

(A) from one or more points outside a State to one or more points within a State or between two or more points within a State through another State, or

(B) from one or more points within Alaska to one or more points in a foreign country. Such a pipeline system shall be deemed to be interstate or foreign commerce if coal that enters the pipeline system is delivered for commercial use in a State than Alaska, in a territory of the United States, or in a foreign country.

An interstate coal pipeline distribution system includes line pipe, valves, pumping stations, water supply pipelines, and such dewatering facilities as are necessary to delivery operations. Such systems shall not include rail, port, highway, or other ancillary coal-gathering or coal-storage facilities;

(3) "private lands" means any interest in any land other than interests—

(A) owned by the United States or agency thereof or owned by any State or any political subdivision thereof;

(B) held in trust by the United States for an Indian or Indian tribe or owned by an Indian or Indian tribe subject to a restraint against alienation imposed by the United States; or

(C) owned by a regional or village corporation established under the Alaska Native Claims Settlement Act, as amended, if such land was transferred to such corporation pursuant to said Act;

(4) "right-of-way" means such interest in private lands, excluding any interest in water, as may be necessary for construction, operation, and maintenance of an interstate coal pipeline distribution system;

(5) "Secretary" means the Secretary of Energy or his successor;

(6) "State" means a State of the United States and the District of Columbia; and

(7)(A) "State water law" includes but is not limited to all substantive and procedural State constitutional provisions, statutory law, judicial decisions, admin-

istrative regulations, and administrative decisions, authorized by the State which apply to water; and

(B) in the case of any State water law which might be argued to be invalid as an improper burden, interference, or regulation of interstate commerce, such State water law shall not be deemed to be invalid for that reason insofar as such law applies to the export or use of water within or outside the State granting or denying the export or use of water for any interstate coal pipeline distribution system. State water law includes both existing law and that new law properly enacted or created in the future.

EMINENT DOMAIN AUTHORITY

SEC. 4. (a) AUTHORITY TO MAKE NATIONAL INTEREST DETERMINATION.—(1) Upon application of any person proposing to construct an interstate coal pipeline distribution system, who has filed and secured approval of a water permit oracquired other appropriate authorization for, interest in, or rights to, control, reservation, appropriation, purchase, transfer, use, diversion, dedication, disposal, distribution, acquisition, exercise, export, or claim of water under State water law as provided in section 5, the Secretary shall determine whether the construction of such system shall be in the national interest.

(2) The determination of the Secretary under paragraph (1) as to whether a proposed interstate coal pipeline distribution system is in the national interest shall be based on the record as a whole, taking into consideration each of the criteria set forth in subsection (b).

(b) FINDINGS.—In making a determination under subsection (a) with respect to any proposed interstate coal pipeline distribution system, the Secretary shall make findings concerning the extent to which the system—

(1) Would help meet national needs for coal distribution and utilization considering, among other matters, alternative routes, or means of distributing coal;

(2) would enhance competition and provide new market outlets and opportunities for coal producers, including small and independent producers;

(3) would contribute to the national security by encouraging the displacement of imported petroleum, petroleum products, and coal with domestic coal;

(4) would result in economic benefits including—

(A) reduction in coal transportation costs;

(B) reduction in wholesale and retail electric rates; and

(C) enhance reliability of supplies of both coal and electric energy; and

(5) would affect the environment, compared to the environmental impacts of alternatives, including—

(A) railroad transportation;

(B) Alternative pipeline routes; and

(C) Coal utilization facilities, including electric generating plants at coal mine sites and coal gasification plants.

(c) SMALL AND INDEPENDENT COAL PRODUCER ACCESS.—(1) For purposes of protecting small and independent coal producers, the Secretary shall require, as a condition of his determination under subsection (a), that the applicant, prior to application, shall offer to make available to such producers the lesser of—

(A) 10 per centum of the total pipeline capacity of the proposed interstate coal pipeline distribution system; or

(B) that portion of the total capacity necessary to satisfy the total interstate coal pipeline distribution system transportation demand of all such small and independent producers located in the geographic region (as determined by the Secretary) served by such pipeline;

under the same terms and conditions as other contracting entities.

(2) For purposes of this subsection, the term "small and independent coal producer" means a coal producer, or a broker or cooperative that represents individual coal producers—

(A) who produced two hundred thousand tons or less of coal during the calendar year preceding the calendar year in which the application is filed, and

(B) are not affiliated with any other company. For purposes of this subparagraph, a coal producer shall be treated as affiliated with another company if such company controls, is controlled by, or is under common control with such coal producer. The term "control" shall have the same meaning as provided by section 10102 of title 49, United States Code.

(d) PROCEDURES.—(1) Any decision under subsection (a) shall be made after notice and opportunity for presentation of written data, views, or arguments in accordance with section 553 of title 5 of the United States Code. If the Secretary, in his discre-

tion, decides to hold hearings, the Secretary shall expedite such hearings and proceedings, and shall schedule all hearings, proposed findings and conclusions, exceptions and any recommended decisions so that the Secretary's final decision under this section shall be issued and completed within eighteen months from the date of receipt of a complete application, except that the Secretary may, for good cause, extend such eighteen-month period for additional periods of not more than ninety days.

(2) Within thirty days after receipt of an application for a determination under this section, the Secretary shall determine whether the application contains all of the information required for its consideration whereupon he shall, within seven days, publish notice of receipt of the application in the Federal Register. The Secretary shall further notify the Governor of each State in which the interstate coal pipeline distribution system will be located. Each notification shall identify the lands over which the interstate coal pipeline distribution system is to be constructed or operated and the water source to be used. If the Secretary determines that all of the required information is not in the application, he shall immediately notify the applicant of all the deficiencies in the application and provide a reasonable period of time for such applicant to provide additional information.

(3) Each applicant for such a determination shall reimburse the Secretary for administrative and other costs incurred by the Secretary in processing the application in such manner as the Secretary shall, by rule, prescribe.

(e) ANTITRUST REVIEW.—(1) Not later than ten days after any application for a determination under this section is filed with the Secretary, the Secretary shall notify the Attorney General of the filing of such application and shall provide the Attorney General with a copy of such application and such other information as the Attorney General may request. The Attorney General shall conduct an antitrust review to determine the likely effects upon competition of approval of such application and, not later than one hundred and twenty days after the date of receipt of such notification shall advise the Secretary of the results of such review, including, but not limited to, findings, and recommendations concerning such terms and conditions as the Attorney General deems necessary to protect and promote competition. No application may be determined to be in the national interest under this section if the Attorney General advises the Secretary in writing that, on the basis of such review, approval of such application is not consistent with the antitrust laws.

(2) For the purpose of paragraph (1), the term—

(A) "antitrust laws" has the meaning such term has under the first section of the Clayton Act (15 U.S.C. 12); and

(B) "antitrust review" has the meaning the term "antitrust investigation" has under section 2 of the Antitrust Civil Process act (15 U.S.C. 1311).

(f) EMINENT DOMAIN AUTHORITY.—(1) Any person proposing to build an interstate coal pipeline distribution system, the construction of which has been determined by the Secretary to be in the national interest, may, after making good faith efforts to acquire such rights-of-way by negotiations between such person and private landowners, acquire rights-of-way over, under, upon, or through private lands by exercise of the power of eminent domain in the United States district court for the district in which such lands are located or in the appropriate court of the State in which such lands are located. In any action or proceeding to acquire rights-of-way under this section, such action or proceeding shall conform to the laws, practices, and procedures relating to the general eminent domain law of the State where the property is situated, except that in the case of any such State law, practice, or procedure, the effect of which would prohibit any acquisition under this section, or which discriminates against interstate coal pipeline distribution systems, such State law, practice, or procedure shall not be applicable.

(2) Nothing in this section shall be construed to permit any person to acquire any right to take, use, dispose of, or develop water through exercise of the power of eminent domain granted under this Act.

(3) No interstate coal pipeline distribution system constructed pursuant to the authorities of this section shall be considered to be a Federal project for purposes of the application for or assignment of water rights.

(4) Unless there is no feasible and prudent alternative to the acquisition of a right-of-way and reasonable planning is made to minimize harm resulting from the acquisition, no such right-of-way may be acquired through exercise of the power of eminent domain under this Act if such right-of-way is over, under, upon or through—

(A) lands of National, State, or local historic significance as determined by the Federal, State, or local officials having jurisdiction thereof; or

(B) lands held by a qualified organization as defined in section 170(h)(3) of the Internal Revenue Service Code of 1954 primarily for wildlife refuge, sanctuary, recreational or natural resource conservation purposes.

(g) ALTERNATIVE ROUTES.—(1) Nothing in this section shall be deemed to prohibit the applicant from amending his application to request a right-of-way over any alternative route.

(2) The Secretary may require the relocation of any right-of-way sought pursuant to this Act upon a showing that—

(A) such relocation is necessary to enable the United States to fully realize the value of its mineral interest;

(B) such alternative route is available; and

(C) such relocation would not result in unreasonable expense.

(h) PAYMENT FOR FEDERAL COAL.—(1) Each application filed pursuant to subsection (a) shall list each instance where the proposed right-of-way crosses lands wherein the United States maintains a mineral interest regarding coal (hereinafter referred to as "Federal coal"). Not later than ten days after any application for a determination under this section is filed with the Secretary, the Secretary shall notify the Secretary of the Interior of the filing of such application and shall provide the Secretary of the Interior with a copy of such application and such other information as the Secretary of the Interior may request.

(2)(A) The Secretary of the Interior shall evaluate the effects of approval of such application upon the ability of the United States to realize the value of such mineral interest as a result of approval of the application.

(B) The Secretary of the Interior shall determine—

(i) terms and conditions necessary to minimize the impact of such right-of-way on the establishment of logical mining units; and

(ii) the extent to which alternative routes are available which would minimize the impact of granting the right-of-way on the ability of the Federal Government to realize the value of Federal coal.

(C) The Secretary of the Interior shall establish the fair market value of the Federal coal precluded from being recovered as a result of the proposed right-of-way. The Secretary of the Interior shall also establish the amount of reduction of the fair market value of Federal coal which will be more costly to recover as a result of the proposed right-of-way.

(3) The Secretary of Energy shall thereafter establish such terms and conditions requiring the applicant to pay the United States the amount established by the Secretary of the Interior pursuant to subparagraph (C).

(i) RULES AND REGULATIONS.—The Secretary shall promulgate such rules and regulations as are necessary for the expeditious exercise of the authority granted in this section.

(j) ADDITIONAL REQUIREMENT.—In implementing this section, the Secretary shall be subject to the provisions of section 210 of Public Law 90–537, as amended (43 U.S.C. 1511).

PRIMACY OF STATE WATER LAW

SEC. 5. (a) No person, legal entity, or governmental entity (including the United States, a State or subdivision thereof), their agents, permittees, licensees, or transferees, or any interstate coal pipeline distribution system, shall control, reserve, appropriate, purchase, transfer, use, divert, dedicate, dispose of, distribute, acquire, exercise, export or claim water, or any right or interest therein, for export or use within or outside the State granting or denying the export or use of water in an interstate coal pipeline distribution system, unless such control, reservation, appropriation, purchase, transfer, use, diversion, dedication, disposal, distribution, acquisition, exercise, export or claim takes place pursuant to and in compliance with the State water law of the State granting or denying the authorization for interest in, or rights to such control, reservation, appropriation, purchase, transfer, use, diversion, dedication, disposal, distribution, acquisition, exercise, export or claim upon water and the protection and enforcement of water rights. Such State water law shall be enforced even though enforcement would result in the failure to build an interstate coal pipeline distribution system, and even though it would result in uneven and disparate effects on interstate commerce.

(b) In full recognition of its powers under Article I, section 8, of the United States Constitution, Congress expressly delegates to the States the power to regulate the use or export of water in interstate coal pipeline distribution systems, through State water laws, notwithstanding any adverse impact such delegation may have on interstate commerce or on any interstate coal pipeline distribution system. This delega-

tion expressly includes but is not limited to provisions of State water law which provide for the establishment or exercise of terms or conditions (including terms or conditions terminating use or relating to or prohibiting the export of water) on permits or authorizations for, interests in, or rights to control, reservation, appropriation, purchase, transfer, use, diversion, dedication, disposal, distribution, acquisition, exercise, export or claim of water for the export or use in any interstate coal pipeline distribution system.

(c) Nothing in this Act shall—

(1) in any way impair the validity of or preempt any provision of State water law, or of any interstate compact governing water;

(2) alter the rights of any State to its apportioned share of the waters of any body of surface or groundwater, whether determined by past or future interstate compacts, or by past or future legislative or final judicial allocations;

(3) preempt or modify any State or Federal law or interstate compact dealing with water quality or disposal;

(4) confer upon any non-Federal entity the ability to exercise any Federal right to the waters of any stream or to any groundwater resources; or

(5) affect water rights of any Indian or Indian tribe which were established by the setting aside of a reservation by treaty, executive order, agreement or Act of the Congress.

(d) No waters to which a Federal right can be asserted shall be used or exported in any interstate coal pipeline distribution system, unless authorized pursuant to and subject to State water law in the same manner as provided for in subsection (a).

APPLICATION OF STATE AND LOCAL LAW

SEC. 6. (a) Nothing in this Act shall impair the validity of or in any way preempt the applicability of a State water law to an interstate coal pipeline distribution system even if such applicability discriminates against or would have the effect of prohibiting the location, construction, operation or maintenance of such pipeline.

(b) Nothing in this Act shall impair the validity of or in any way preempt any other State or local law, regulation, or rule of law pertaining to the location, construction, operation, or maintenance of an interstate coal pipeline distribution system except where such State or local law, regulation, or rule of law discriminates against interstate coal pipeline distribution systems.

UNDERGROUND CONSTRUCTION

SEC. 7. All coal pipelines granted Federal powers of eminent domain, pursuant to the provisions of this Act, for rights-of-way and extensions thereof shall, to the maximum extent practicable, consistent with environemntal protection, safety, and good engineering and technological practices, be located underground, and the person holding such right of Federal eminent domain shall replace sufficient topsoil on disturbed areas so that a vegetative cover, comprised of native species where practicable, can be re-established at least equal in extent of cover as that which sustained the natural vegetation in the area.

CONTINUING JURISDICTION OF STATE PUBLIC UTILITY COMMISSIONS

SEC. 8. Nothing in this Act shall be construed to require any forms of automatic pass through of, or preempt the ratemaking authority of any State utility regulatory agency or the Federal Energy Regulatory Commission with respect to costs related to construction, operation, and maintenance of any interstate coal pipeline distribution system, whether or not such costs have been provided for by contract between a utility and the interstate coal pipeline distribution system operator.

LIMITATION ON FURTHER REGULATION

SEC. 9. Nothing in this Act shall be construed to authorize the further regulation of, or to relate to or otherwise affect the regulation of, interstate common carriers.

APPLICABILITY OF ENVIRONMENTAL CONTROL LAWS

SEC. 10. Any interstate coal pipeline distribution system authorized under this Act shall be subject to the requirements of the Federal Water Pollution Control Act, as amended (33 U.S.C. 466 et seq.), and any other applicable Federal environmental control laws.

WATER DISCHARGE REQUIREMENTS

SEC. 11. (a) Prior to the issuance of any findings pursuant to section 4 of this Act, the Secretary shall notify the Administrator of the Environmental Protection Agency of his consideration of the application for a determination under subsection 4(a). The Secretary and the person applying for such determination shall provide such information as the Administrator shall require to conduct a review of the ability of the proposed interstate coal pipeline distribution system to comply with Federal water discharge requirements. The Administrator shall have one hundred and twenty days from the date of receipt of such notification to conduct such review and to advise the Secretary with respect thereto. The Secretary shall not issue any findings pursuant to section 4 unless he has received a report from the Administrator of the Environmental Protection Agency advising that, in the judgment of the Administrator, it can reasonably be expected that the water discharge can meet the requirements of the Federal Water Pollution Control Act.

(b) Any applicant under subsection 4(a) shall retain, in the course of and following a determination, the responsibility for complying with all Federal statutes, regulations, and rules related to water discharges. This responsibility may not be avoided by transferring it to any person, including any public utility receiving coal from the pipeline.

I. PURPOSE OF THE MEASURE

The purpose of the measure as reported by the Committee on Energy and Natural Resources, is to facilitate the development of interestate coal pipeline distribution systems, subject to the primacy of State water law. This is accomplished by granting the Federal power of eminent domain to those interstate coal pipeline distribution systems that are determined by the Secretary of Energy to be in the national interest based on certain statutory findings, while ensuring, through the delegation of Congressional power under the Commerce Clause, primacy of State water law and procedure regarding water used in interstate coal pipeline distribution systems.

II. SUMMARY OF MAJOR PROVISIONS

The major provisions of S. 267, the Coal Distribution and Utilization Act of 1983, as reported would:

(1) Authorize the Secretary of Energy, upon application of a person proposing to construct an interstate coal pipeline distribution system, to determine whether the construction of such system would be in the national interest. In making such a determination the Secretary is required to make certain statutory findings.

Prior to making a determination of "national interest," the Secretary is required to obtain an antitrust review from the Attorney General, a report from the Administrator of EPA concerning water discharge requirements, and provide an opportunity for public comment and notice to the Governors of any State in which the proposed system will be located. The determination of the Secretary is to be based on the record as a whole.

Prior to making an application, an interstate coal pipeline distribution system must offer up to 10 percent of the pipeline capacity to small and independent coal producers.

(2) Authorize use of the exercise of the power of eminent domain to acquire rights-of-way over, under, upon or through private land if the construction of the interstate coal pipeline distribution system has been determined by the Secretary of Energy to be in the national interest. Any action or proceeding to acquire rights-of-

way would be subject to certain restrictions regarding application of State laws.

(3) Preserve the application of any State or local law pertaining to the location construction, operation, and maintenance of an interstate coal pipeline distribution system, except where such law discriminates against the system.

(4) Establish the primacy of State water laws relating to the control, appropriation, use, disposal, or export etc. of water and the protection and enforcement of water rights with respect to water used in interstate coal pipeline distribution systems through a delegation of Congressional power under the Commerce Clause of the United States Constitution.

(5) Require that the applicant for a proposed pipeline compensate the Federal Government for the fair market value of any "Federal coal" precluded from being recovered or the reduction in value of any Federal coal, as a result of the proposed distribution system.

(6) Require to the maximum extent practicable, that interstate coal pipeline distribution systems granted the power of Federal eminent domain be located underground.

III. Background and Need

INTRODUCTION

The United States has undergone a major transformation in its role as an energy producer in the past two decades. Recoverable reserves of oil and natural gas, fuels upon which we have been particularly reliant, are steadily declining as our nation's energy consumption escalates. Recognizing that our country has close to one-third of the world's recoverable coal reserves, we have made a recent *shift* in fuel use patterns so as to return to greater dependence on coal—our most abundant fossil fuel.

Expansion of transportation facilities and options will facilitate the use of coal in this country. Due to rising domestic transportation costs, many coal users have found it cheaper to import coal from abroad. This trend has not only limited the use of coal in our domestic markets, but has restrained the ability of U.S. coal to compete in world trade.

SHIFT TOWARD COAL

The United States; national energy policy under the last four Adminstrations has recognized that the increased use of coal is an important facter in moving this Nation toward energy self-sufficiency. This recognition is based on the fact that coal is our most abundant fossil fuel. More than 50 percent of the electricity produced in the United States is generated from coal and approximately 75 percent of all coal used in the United States is burned by utilities to produce electricity. It is likely that coal-fired electrical generating capacity will expand if the cost of transportation of large volumes of coal over long distances is reduced.

The United States is not the only nation which has notably increased its use of coal. In recent years, many industrialized nations also have increased their use of this fossil fuel. This has led to a growing export market which is expected to double in the next ten

years. The United States holds a strategic position with respect to realizing the opportunities from an expanded export market. The rise in export demand for coal could contribute to our Nation's economic well-being both by improving our balance of trade, and providing additional jobs for Americans throughout the country. Clearly, the future for an active role in the coal export market appears optimistic if our transportation costs are reasonable enough to be competitive on the world market.

Coal slurry pipelines represent an additional mode of transportation which promises to be environmentally sound and economically feasible. If coal can be transported by coal slurry pipelines more cheaply than by railroads, coal could become more attractive to domestic users. The development of coal slurry pipelines could potentially reduce our dependence on foreign oil and natural gas. In addition, coal slurry pipelines could increase the United States' share of the international coal market by augmenting the coal industry's capacity to deliver coal for export.

Recent legislation bearing on the coal industry has further heightened the need to develop alternative means of coal transportation. The first of these is the Powerplant and Industrial Fuel Use Act of 1978. This measure encourages the use of domestic coal by prohibiting certain new powerplants and major fuel burning installations from burning natural gas or petroleum.

The second significant piece of legislation is the Staggers Rail Act of 1980 wich provides the railroads with greater flexibility in setting rates, including those for the transportation of coal by contract. This Act has resulted in a sharp increase in coal hauling rates. In fact, without effective competition, unregulated rail rates are expected to continue to rise steadily in the years to come.

COAL TRANSPORTATION

Coal is currently shipped principally by railroad and barge and, to a limited degree, by truck. Approximately 65 percent of the coal shipped is by railroad. This accounts for approximately 25 percent of the tonnage and 11 percent of the revenues for Class I railroads on a national basis. For 85 percent of the coal carried by unit trains, no alternative means of transporting the coal from the mine mouth to its point of delivery exists. In regions such as the West, where long hauls make truck competition impractical and inland waterways are not available, 97 percent of the coal produced is transported by the railroads.

On a nationwide basis, the cost of transporting coal by rail from the mine to the powerplant is approximately equal to the price of the coal or about one half of the total delivered cost. In some extreme instances, 70 cents of every dollar of the delivery cost of coal can be attributed to the cost of transportation.

In some instances the costs of transporting low-sulfur coal have led to economic decisions by electric utilities to either not convert certain generating plants to coal or to import coal. This occurred in the cases of the Central Power and Light Company of Corpus Christi, Texas, as well as the Tampa Electric Company of Tampa, Florida, and the Celenese Chemical Company for its plant in Pampa, Texas.

Aside from the cost considerations, the National Energy Transportation Study (NETS) conducted by the Department of Transportation (DOT) and the Department of Energy (DOE) addresses the limitations in transport capacity of existing railroads in certain areas. This report concluded that 60 million tons of coal could not be transported from the Powder River Basin in Wyoming and Montana "due to congestion" on the railways in this area.

COAL SLURRY PIPELINES

The technology of coal slurry pipelines consists of grinding the coal or other material to powder of sufficiently fine consistency to mix well with water, mixing the powder in approximately equal proportions with water, and pumping it through the pipeline. On the longer pipelines, supplemental pumping plants are generally required at various points. At the receiving end, after the coal is separated from the water it can be burned directly for thermal electric power generation or transferred to other transportation modes.

According to the 1978 analysis of coal slurry pipelines by the Office of Technology Assessment, over long distances pipelines represent the least costly means of transporting high annual volumes of coal.

The primary financial advantage of slurry pipelines transport, as opposed to unit train transport of coal, is that pipelines are relatively inflation-proof. The greatest expense of a pipeline is the initial construction, a capital investment with a certain fixed interest rate. Operation and maintenance constitute a relatively minor expense. Therefore pipelines are more resistant to inflation due to high fixed costs (approximately 70 percent) and relative low variable costs (only 30 percent). By comparison, approximately two thirds of rail rates are composed of variable costs, and one-third of fixed costs.

The technical and economic feasibility of coal slurry pipelines has been demonstrated in two projects. The first coal slurry pipeline was developed in Ohio in 1957. The 10-inch pipeline, built to offset high coal rates, ran 108 miles from Cadiz, in southeastern Ohio, to Eastlake, in suburban Cleveland. This line operated for 6 years with a capacity of 1.3 million tons of coal per year before being underpriced by the introduction of unit trains.

The second coal slurry pipeline, the Black mesa Pipeline, currently in operation, runs 273 miles from the Black mesa mine on Navajo land in northeastern Arizona, to the Mojave Power Plant in extreme southern Nevada. The 18-inch diameter pipe has a capacity of 4.8 million tons of coal per year.

Several companies have announced plans for construction of coal slurry pipelines to transport coal from mine sites to power plants and other consumers. At least nine additional coal slurry pipeline systems have been proposed. In 1973 the Energy Transportation System Incorporated (ETSI), announced plans for a 1,030-mile coal slurry pipeline to run from the Gillette, Wyoming area to the Pine Bluff, Arkansas area. Current plans would extend the line to Baton Rouge, Louisiana. The proposed pipeline would be 30-inch diameter with a capacity of approximately 25 million tons of coal per year.

The principal purchaser of the coal would be Arkansas Power and Light Company, a subsidiary of Middle South Utilities Incorporated. Construction of the ETSI pipeline is to begin in 1983 with operation by 1985.

Another major pipeline is the Coalstream Pipeline, a 1,500-mile coal slurry pipeline from Appalachia and the Illinois basin to Georgia and Florida, at a cost of 43 billion. Smaller-capacity coal slurry pipelines under consideration include:

(1) a 1,100-mile, 7-million-tons-per-year line from northwest Colorado to the Houston, Texas area—the San Marco Pipeline;

(2) a 180-mile, 10-million-tons-per-year line from Utah to Nevada;

(3) a 350-mile, 5-million-ton pipeline from western Virginia to Hampton Roads, owned by the Virginia Electric Power Company;

(4) a 1,100-mile, 24-million-tons-per-year pipeline from Wyoming to Oregon, known as the NICES system (Northwest Integrated Coal Energy System);

(5) the Pacific Bulk Pipeline, a 650-mile, 10-million-tons-per-year proposal from Utah to southern California;

(6) a 1,260-mile, 30-million-tons-per-year line from Montana to Texas owned by Texas Eastern Transmission Corporation; and

(7) the Powder River Pipeline, a large-volume pipeline from Montana to utilities in the Midwest.

FEDERAL POWER OF EMINENT DOMAIN

In the 1860's and 1870's the land grant railroads obtained Federal eminent domain authority in order to foster the expansion of the West. The principal precedent for the granting of the power of eminent domain is that granted to natural gas pipelines by the 1947 amendment of the Natural Gas Act (15 U.S.C. 717f(h)). Oil pipelines were authorized to use the Federal power of eminent domain during World War II under the war powers of the Cole Act. Federal Power Commission licensees for hydroelectric projects can also use eminent domain. Eminent domain authority was similarly extended to electric transmission lines.

Coal pipelines, like gas and oil pipelines, and the railroads, represent means of long-distance transportation. Thus, granting coal pipelines the right of Federal eminent domain authority would be consistent with the authority which has been extended to these other forms of transportation in preceding years.

The development of an interstate coal pipeline network has been impeded by the difficulty of obtaining rights-of-way within each State. The ETSI Coal Pipeline project, which is soon to begin construction, highlights the difficulties faced in trying to obtain rights-of-way across railroad property. ETSI has only now obtained the rights-of-way necessary for the pipeline after winning 65 law suits against the Union Pacific railroad. The delay caused by lengthy litigation has increased the cost of the project from $800 million to $3.5 billion. Furthermore, the success of the ETSI litigation was based on the terms of the Federal grants of rights-of-way to the

Union Pacific railroad. It is unlikely that similar litigation would succeed in the non-public land States.

The importance of granting interstate pipelines Federal eminent domain authority is further borne out by the inconsistencies in State laws governing eminent domain authority for coal slurry pipelines. Several States are subject to statutes which prohibit them from granting eminent domain authority to such projects unless the pipelines are of public use and benefit to the people of the State. This criterion is virtually impossible to meet in those States which are traversed by pipeline but are not the repository of its coal and so not served by the pipeline.

Granting Federal eminent domain authority to coal slurry pipelines will facilitate the development of this new and progressive mode of transportation. Competition in the transportation of coal will help ensure increased efficiency and lower prices to consumers of coal. This new technology, given the opportunity to compete, will help our Nation in its goal to utilize its vast coal reserves and to become a more effective competitor on the world market.

APPLICATION OF STATE WATER LAW

The application of State water law was a major focus of Committee attention. Perhaps no element of the development of interstate coal pipeline distribution systems has been as controversial as the potential impact of such development on scarce Western water supplies and the right of States to allocate water within their boundaries. This controversy was further stimulated by the agreement between the Energy Transportation System Inc. (ETSI) and the State of South Dakota to use 15,000 to 20,000 acre-feet per year of surface water from the Qahe Reservoir in South Dakota.

Several States thus have expressed concerns regarding the validity and application of State water laws in the State of origin of water supplies. In addition, States which are not the origin of water supplies, but share in the water supplies, particularly groundwater supplies, or are within the same river-basin, have become increasingly concerned for the protection of their interests should any water be diverted for use in an interstate coal pipline distribution system.

These concerns have been futher heightened by recent court decisions. Because of these concerns the bill provides for the primacy of State water law and procedures regarding water used in interstate coal pipeline distribution systems including those granted the right of eminent domain under this Act.

IV. Legislative History

On January 27, 1983, Senator Johnston introduced S. 267, the Coal Distribution and Utilization Act of 1983. The measure is cosponsored by Senators Bumpers, Murkowski, Bradley, Stevens, Hawkins, Humphrey, Nickles, Goldwater, Matsunaga, Wilson, DeConcini, and Hatch.

In previous Congresses, similar bills have been introduced in the Senate and House of Representatives. None were enacted into law. In the 93d Congress, this Committee's predecessor, the Committee on Interior and Insular Affairs, favorably reported S. 2879 which

passed the Senate by voice vote. During the 97th Congress, the Committee reported favorably S. 1844, a measure similar to S. 267.

Following introduction of S. 267 in this Congress, the full Committee held hearings on March 14, 1983. Testimony was received from public witnesses. Similar legislation, H.R. 1010, is pending before the House of Representatives. On April 15, 1983, H.R. 1010 was reported favorably by the House Committee on Interior and Insular Affairs.

V. Committee Recommendation and Tabulation of Votes

The Committee on Energy and Natural Resources, in open business session on April 14, 1983 by a vote of 13 yeas to 7 nays of a quorum present recommends that the Senate pass S. 267, The Coal Distribution and Utilization Act of 1983, as amended.

During the consideration of the bill by the Committee, voice and rollcall votes were taken on amendments offered to the bill. These votes were taken in open business session, have been announced publicly by the Committee, and are included in the minutes of each session in accordance with the requirements of section 133(b) of the Legislative Reorganization Act of 1946, as amended.

The rollcall vote on reporting the measure was 13 yeas and 7 nays as follows:

YEAS	NAYS
Mr. McClure	Mr. Hatfield
Mr. Weicker[1]	Mr. Domenici[1]
Mr. Wallop	Mr. Warner
Mr. Murkowski	Mr. Heinz[1]
Mr. Nickles	Mr. Ford
Mr. Hecht	Mr. Metzenbaum[1]
Mr. Chafee[1]	Mr. Melcher
Mr. Johnston	
Mr. Jackson[1]	
Mr. Bumpers[1]	
Mr. Matsunaga[1]	
Mr. Tsongas[1]	
Mr. Bradley	

VI. Committee Amendment

The Committee amended S. 267, the Coal Distribution and Utilization Act of 1983, to strike all after the enacting clause and insert a substitute text. Aside from technical, clarifying and conforming amendments, the following substantive changes were made by the Committee to the bill as introduced.

S. 267, as introduced, was virtually identical to the amendment to the text of S. 1844 as reported from the Committee during the 97th Congress (S. Rpt. 97-528). A principal purpose of that measure and S. 267 as introduced was to present a clear and express statement by Congress regarding the relationship of State water law to all interstate coal slurry pipelines, including those granted the Fed-

[1] Indicates voted by proxy.

eral power of eminent domain. The Committee amendment retains and further clarifies that intent.

FINDINGS AND PURPOSE

The findings included in paragraphs (7), (8), (9), and (10) of subsection 2(a), collectively declare that the primacy of State water law is a superior national interest to the development of interstate coal pipeline distribution systems; and correspondingly, that the need for such systems is subservient to such primacy. The purposes of the legislation in subsection 2(b) have been modified to declare that the facilitation of the development of interstate coal slurry pipelines is subject to the primacy of State water law. This change is coupled with the requirement of Section 4 that the application of any person proposing to construct an interstate coal pipeline distribution system, is conditioned upon the prior filing for, and approval of, necessary water permits or other authorizations under applicable State law, this ensures that there cannot be a national interest determination for purposes of access to Federal eminent domain powers unless State water law has been satisfied.

DEFINITIONS

The definition of an "interstate coal pipeline distribution system" in subsection 3(2) was modified in two respects. First, the definition was amended to clarify that in no event may a purpose of the system be to distribute water. The change was made with the recognition that water used to mix with coal will necessarily be an end-product of the pipeline system, but in no event may a purpose for construction of an interstate coal pipeline distribution system be the transportation or distribution of water. An "interstate coal pipeline distribution system" would not include a pipeline or any portion thereof in which the distribution of water, as water, was an integral purpose. If a pipeline is not economic without the distribtion of water, it would not qualify for the eminent domain authority under this measure. Also, water distribution systems intended to deliver water for uses other than the coal slurry pipeline system, would not be included as part of the interstate coal pipeline distribution system or eligible for the eminent domain authorities under this measure. The Committee notes that most States have statutes providing State eminent domain for such water distribution systems which may be utilized. If, however, water is used at the end of the system as an incidental result of it being available, the eminent domain authorities of this measure would be available assuming the pipeline system otherwise qualifies.

The definition in subsection 3(2) was further amended to clarify that rights-of-way for access to water may only be obtained under the authority of this measure after the right to use such water has been obtained pursuant to substantive and procedural State water law. Subsection 3(3) was amended to clarify that the definition of "right-of-way" does not include any interest in water and is applicable only to private lands.

A new subsection 3(7) was added to define the term "State water law". The definition is not intended to be exhaustive. It includes at

a minimum both existing and future substantive and procedural statutory law, State constitutional provisions, judicial decisions and administrative law. The amendment clarifies that State water laws which might otherwise be invalid in the absence of this legislation due to improper regulations of interstate commerce, are not to be deemed invalid insofar as they apply to any interstate coal pipeline system. The Committee intends that this definition include the entire body of State law, of the State granting or denying the water right, which must be complied with by an interstate coal pipeline distribution system to obtain rights to use or export water for the system. The definition includes the water law of the State or States granting the rights to the primary supply of water for the pipeline and the State or States which may grant rights to supplementary water supplies. It is intended to encompass all State substantive and procedural water laws which apply in the acquisition of water rights. It is important to note that this definition does not broaden the scope of this bill beyond those situations in which water is used in an interstate coal pipeline distribution system. This definition, read in conjunction with Section 5, makes it clear that this bill affects the validity of State water law only as applied to interstate coal pipeline distribution systems. It is not intended to include the water laws of States through which the pipeline and the water/coal mixture may merely be transmitted.

EMINENT DOMAIN AUTHORITY

Applications.—The Committee amendment made several changes to Section 4 of the bill as introduced. Subsection 4(a)(1) was modified to clarify that the appropriate permits, authorization or rights to use or export water must be obtained before any person may apply for a national interest determination under the provisions of the bill. This paragraph read in conjunction with paragraph 4(f)(2) prohibiting the use of eminent domain for the acquisition of water rights, and paragraph 4(f)(3) which negates the possibility of construing as a Federal project any project granted eminent domain under this measure, expressly negate any arguable implication that the availability or use of the Federal eminent domain power under Section 4(f) would in any manner affect the primacy of State water law established in Section 5.

Small and independent producer access.—The Committee amendment adds a new subsection 4(c) which requires as a precondition to making an application under subsection 4(a), that an applicant shall offer to small and independent coal producers a portion of the capacity of the proposed interstate coal pipeline distribution system not to exceed 10 percent of the total capacity. The offer must be under the same terms and conditions given to other contracting entities. This provision does not require a permanent set-aside of capacity for the use of small and independent coal producers. It require only that an applicant, prior to application, shall offer to make capacity available to such producers. Once such producers have had an adequate opportunity to accept such an offer, the applicant shall not be required to make additional capacity available at a later time. This provision may not guarantee all small opera-

tors access to coal slurry pipelines. However, it is the intent of this provision to assist them in obtaining such access.

Procedures.—The Committee amendment also adds a new subsection 4(d) setting forth the procedure by which the Secretary will consider applications. The subsection provides that section 553 of title 5 of the U.S. Code will be followed. The Committee does not intend that a hearing be required for each application. However, if the Secretary in his discretion decides to hold a hearing, it shall be expedited in order that a final decision may be issued within 18 months of receipt of a completed application. The deadline may for good cause be extended for periods of not more than 90 days. The new subsection also provides for notification of the Governors of States where the pipeline is located and for reimbursement by the applicant of costs.

Eminent domain.—The Federal eminent domain authority in subsection 4(f) was modified in two respects. First, an interstate coal pipeline distribution system determined to be in the national interest is required to make good faith efforts to acquire rights-of-way from private owners through negotiations prior to exercising the power of eminent domain. The Committee believes that most pipeline systems as a matter of sound business practice would attempt good faith negotiations prior to acquisition by condemnation and may be required to do so as a matter of State law. The second modification to subsection 4(f) provides an additional exception to the normal rule that eminent domain proceedings authorized under this measure shall conform to the laws, practices and procedures of the State in which the property is located except where such law, practice or procedure would have the effect of prohibiting acquisition. The additional exception includes State laws which discriminate against interstate coal pipeline distribution systems. This provision attempts to strike a balance between (a) the desirability of applying valid State eminent domain laws where available, and (b) ensuring that the Federal intent that interstate coal pipeline distribution systems determined to be in the national interest be able to acquire rights of way and not be frustrated through such application. Thus, any State law, other than a State water law which expressly prohibits, effectively prohibits, or which discriminates against interstate coal pipeline distribution systems relative to other projects to which eminent domain is available, would not be applicable.

Section 4(f)(4) was amended to require that rights-of-way across private lands of Federal, State or local historic significance, or held by qualified non-profit organizations primarily for wildlife refuge, sanctuary, recreational or resource conservation purposes, could not be acquired through the exercise of Federal eminent domain unless there is no feasible and prudent alternative and planning is done to minimize the harm. The Committee deleted similar language in the original bill relating to wilderness areas and wildlife refuges because it believed it could be construed as less protective than existing law. The Committee substitute clarifies that this legislation does not provide the power of eminent domain to cross lands owned by the United States or owned by any State or local government. This legislation provides the power of eminent domain only as to private lands, as defined in section 3(3).

PRIMACY OF STATE WATER LAW

The Committee amendment includes complete substitutes for subsections 5(a) and 5(b) of the introduced bill regarding the primacy of State water law. The Committee believes those new subsections perfect and clarify the intent of the measure in establishing the primacy of State water as a superior national interest above the interest in constructing *any* interstate coal pipeline distribution system, even those which do not seek the eminent domain authority available under this measure.

Section 5(a) was amended to clarify that no person, including state or federal governments can obtain water for use or export in interstate coal pipeline systems unless such water is obtained in accordance with the water law of the State granting or denying such use. The provisions are equally applicable to the use or export of unappropriated or diverted water in the first instance, as they are to a change in use of an existing water right for use in an interstate coal pipeline distribution system. The amendment expressly includes the ability of a State to deny the right to use or export water for an interstate coal pipeline distribution system. It also includes a statement which clarifies that State water law shall be enforced even if it would result in the failure to build an interstate coal pipeline distribution system and even though uneven and disparate effects on interstate commerce might occur.

Section 5(b) was amended to clarify the Committee's intent that Congress is expressly delegating to the States, pursuant to its powers under the Commerce Clause of the Constitution, the power to regulate the use or export of water in any interstate coal pipelines distribution system through State water laws. This is true even if such delegation has an adverse impact on interstate commerce. The amendment expressly includes the ability of a State to deny, terminate, or prohibit the use or export of water for such pipelines or to impose terms and conditions on such use as it deems necessary. These provisions are equally applicable to the use or export of unappropriated or diverted water in the first instance, as they are to a change in use of an existing water right for use in an interstate coal pipeline distribution system.

The delegation of authority to the States under this subsection is strictly limited to the regulation of the use or export of water in an interstate coal pipeline distribution system. The Committee intends that this legislation have no affect on the existing authority of States to regulate the use or export of water for purposes other than interstate coal pipeline distribution systems. The Committee does not intend to affect the decision or underlying rationale of *Sporhase* v. *Nebraska*, —— U.S. ——, 102 S. Ct. 3456 (1982) except in the limited instance of an interstate coal pipeline distribution system.

The Committee amendment clarifies subsection 5(c)(1) in recognition of the fact that the validity of certain State water laws may be affected by this measure; that is, laws which might otherwise be invalid, will be valid as they are applicable to interstate coal pipelines.

The Committee amendment adds a new subsection 5(c)(2) which clarifies the Committee's intent that this measure does not alter

the right of any State to its allocation of water under an interstate compact, judicial decision or legislative enactment. It applies to both existing and future equitable apportionments.

By American provision.—The Committee amendment does not include the provision of the introduced bill which established a requirement that American-made materials and supplies be used in the construction and maintenance of any interstate coal pipeline distribution system found to be in the national interest.

APPLICATION OF STATE AND LOCAL LAW

The Committee amendment modified the section of the introduced bill relating to the application of State and local laws. Subsection 6(a) is amended to avoid any erroneous interpretation of the relationship of section 7 as introduced with other provisions of the bill relating to the primacy of State water law under section 5 or the requirements in section 4(a)(1) for State water permits as a condition precedent to an application. The Committee intends that the validity of the State water law where water is sought to be acquired for use or export in any interstate coal pipeline distribution system will not be impaired or preempted in any way by this measure, even if such laws prohibit or discriminate against such system. This subsection does not provide authority for a State through which the interstate coal pipeline distribution system passes to tax the passage of water through the interstate coal pipeline distribution system.

The Committee amendment also deals with application of State and local laws other than State and local water law. As noted previously, S. 267 as introduced provided that in any proceedings for the exercise of Federal eminent domain, such proceedings shall conform to the laws, practices and procedures relating to the general eminent law of the State in which the property is situated except in cases where application of such State law, practice or procedure would have the effect of prohibiting any acquisition. The Committee, concerned with the standards to be applied under such section, added an exception to provide that any State law, practice or procedure which discriminates against interstate coal pipeline distribution systems would likewise not be applicable. This provision attempts to strike a balance between the desirability of applying valid State eminent domain laws where available, and insuring that the Federal intent not be frustrated through application of a State or local law, practice or procedure which would effectively prohibit or which discriminates against interstate coal pipeline distribution systems.

In addition, the Committee amendment in subsection 6(b) deals with the application of State and local laws other than State water laws pertaining to the location, construction, operation or maintenance of an interstate coal slurry pipeline distribution system. As introduced, S. 267 provided a savings clause for all State and local laws pertaining to location, construction, operation and maintenance, preserving such State laws from any implication of pre-emption, providing that such State laws did not have the effect of prohibiting related to the pipeline.

Again concerned about the standards to be applied under this section, the Committee chose to delete the exception related to prohibition of pipeline activities and substituted in its stead the concept that, any State or local law pertaining to location, construction, operation or maintenance would be applicable to an interstate coal pipeline distribution system except where such State or local law discriminated against coal pipeline activities. The Committee intends to make clear under this section that such State laws will apply even where they would serve to prohibit the location, construction, operation and maintenance provided that the application is non-discriminatory. Thus, the authority of a State to apply its laws related to construction, location, operation and maintenance is broadened to allow non-discriminatory prohibitions.

UNDERGROUND CONSTRUCTION

The Committee amendment adds a new section 7 which requires underground construction to maximum extent practicable of interstate coal pipeline distribution systems granted eminent domain under this measure. The section also requires replacement of topsoil on disturbed areas.

APPLICABILITY OF ENVIRONMENTAL CONTROL LAWS

The Committee amendment also adds a new section 10 explicitly stating that pipeline systems must comply with the Federal Water Pollution Control Act, as amended and other applicable environmental laws. The Committee of course intends that all other applicable laws shall remain so.

WATER DISCHARGE REQUIREMENTS

The Committee amendment also adds a new section 11 which requires the Administrator of the Environmental Protection Agency to conduct a review of the ability of an applicant under subsection 4(c) to comply with Federal water discharge requirements. The Administrator must report to the Secretary that in his judgment such laws can reasonably be expected to be complied with. The Committee intends that the report required by this section will be made during the normal environmental review process otherwise required by law. This section does not require nor should it result in the preparation of an additional environmental impact statement. The report should be included in the environmental impact statement, if any, which may be required under existing law.

In addition, this report is not intended to be the subject of judicial review, prior to a final determination under 4(a) by the Secretary. The report of the Administrator is to be considered part of the information made available to the Secretary prior to his making a final decision. The Secretary's decision, once final, is of course judicially reviewable under the standards normally applicable to administrative proceedings.

Section 11(b) contains provisions requiring a coal slurry pipeline to retain responsibility for complying with Federal water discharge laws. However, the Committee does not intend to preclude any contractual agreement, such as an insurance or indemnity agreement,

as long as such agreement does not relieve the applicant of ultimate responsibility for water discharges from an interstate coal pipeline distribution system.

COMMON CARRIER STATUS

The Committee did not resolve the issue of whether interstate coal pipeline distribution systems should be regulated as common carriers. The Committee expects that this issue will be addressed by the full Senate.

GENERAL DISCUSSION

The Committee amendment reflects the essential compromise struck by the Committee in its consideration of Federal assistance for "national interest" pipelines.

In effect, the Committee has reported substitute legislation which has two purposes: (1) access to Federal eminent domain powers for "national interest" pipelines; and (2) the absolute primacy of State water law applicable to all interstate coal pipeline distribution systems. This duality of purpose reflects the Committee's conclusion that the limited Federal assistance for certain coal slurry pipelines (i.e., access to Federal eminent domain powers) should only be provided in Federal legislation which also establishes beyond question the greater national interest in the primacy of State water law. The Federal purpose, then, expressed in the reported Committee amendment, incorporates these different inextricably linked purposes without which the bill could not and would not have been favorably reported. Stated another way, the Committee intends that the eminent domain provisions of this Act be narrowly construed. The Committee does not intend these provisions to be construed as an "intention of Congress to secure a comprehensive development of national resources . . ." as was found in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S. 152 (1946). There is no intent to generally legislate in this field, but rather, the intent is to grant a well-defined and specifically limited authority for the potential use of the power of eminent domain by private parties constructing coal slurry pipelines subject to the primacy of State water law. By contrast, the provisions related to State water law are expressly intended by the Committee to be a broad delegation of power, and to be so construed. The Committee recognizes that this policy may result in a nonuniform set of laws governing the availability or use of water in coal slurry pipelines, but concludes that the greater national interest resides in protecting and maintaining the primacy of State water law, including interstate compacts regarding the allocation of water.

The Committee adopted this policy after receiving expert testimony on both water and Constitutional law. It conducted a careful review and analysis of both longstanding Congressional policy regarding the sanctity of State water law, and the judicial interpretations of relevant State and Federal statutes, including the most recent decisions by the U.S. Supreme Court in *New England Power Co.* v. *New Hampshire* —— U.S. ——, 102 S. Ct. 1096, (1982) and *Sporhase* v. *Nebraska,* —— U.S. ——, 102 S. Ct. 3456 (1982).

Beginning with the Act of July 26, 1866 (14 Stat. 251), Congress expressly confirmed water rights acquired in accordance with State law in numerous statutes which have been the subject of equally numerous judicial interpretations. Generally, in examining the validity of a particular State law or action against a particular Federal statute including water provisions, the Courts have sought to define the extent to which Congress has clearly expressed the relationship of the provisions to powers under the Commerce Clause (Article I § 8, Clause 3 of the U.S. Constitution), the Supremacy Clause (Article VI, Clause 2 of the U.S. Constitution), and the intended purpose of the statute as a whole.

Under the Commerce Clause of the Constitution, Congress has plenary power to regulate interstate commerce. It is empowered to determine whether the interests of the nation are better served by uniform Federal regulation, or by nonuniform or more restrictive State control. Where the Constitution grants to Congress the power to legislate, it may discharge its legislative function by adopting State laws, present or prospective. *United States* v. *Sharpnack,* 355 U.S. 286 (1958); *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408 (1946). It may also remove the obstacles to State legislation which will permit the State itself to legislate directly on the subject. *Butte City Water Co.* v. *Baker,* 196 U.S. 119 (1905); *In re Rahrer,* 140 U.S. 545 (1891). Moreover, the United States Supreme Court has recently reconfirmed that Congress may "confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Investment Managers, Inc.,* 447 U.S. 27, 44 (1980). This is true notwithstanding the fact that the Commerce Clause contains an implied limitation on the power of the States to burden interstate commerce. *See Cooley* v. *Board of Wardens,* 53 U.S. 299 (1852). For, "if Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the Congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & Southern Life Insurance Co.* v. *State Board of Equalization,* 451 U.S. 648, 652–3 (1981). Also see *New England Power Co.* v. *New Hampshire,* —— U.S. ——, 102 S. Ct. 1096 (1982).

As Chief Justice Stone stated in *Southern Pacific Co.* v. *Arizona* (325 U.S. 761, 766–7 (1948),

> Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the States to regulate the commerce in a manner which would otherwise not be permissible, or exclude State regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce. (Citations omitted)

More recently, in the *New England Power Co.* case, Chief Justice Burger pointed out in the unanimous opinion of the Court,

> It is indeed well settled that Congress may use its powers under the Commerce Clause to confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. The dispositive question, however, is whether Congress in fact has author-

> ized the States to impose restrictions of the sort at issue here. (Slip opinion, p. 8; citations omitted)

Moreover, in summarizing the history of Congressional enactments regarding State water law and judicial interpretations regarding State water law and judicial interpretations in *Sporhase,* Justice Stevens stated,

> Although the 37 statutes and the interstate compacts demonstrate Congress' deference of State water law, they do not indicate that Congress wished to remove Federal constitutional constraints on such State laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the valid State law to which Congress has deferred. Neither the fact that Congress has chosen not to create a Federal water law to govern water rights involved in Federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' "intent and policy to sustain State legislation from attack under the Commerce Clause" was "expressly stated". (Slip opinion, pp. 17–18; citations omitted)

The Committee intends that the language of the Committee amendment in Sections 2(a)(7), 2(a)(8), 2(a)(9), 2(b), 4(a)(1), 4(e)(2), 4(e)(3), and 5 constitutes a clear and "expressly stated" "intent and policy" as stated by Justice Stevens in *Sporhase,* giving the consent of Congress under the Commerce Clause, necessary to allow the States to regulate commerce through the application of State water laws to interstate coal pipeline distribution systems in a manner which could be otherwise impermissible. The Committee in the words of Chief Justice Burger in *New England Power Co.* "in fact has authorized the States to impose restrictions" on commerce. It is the unequivaocal intent of this bill to establish the primacy of State water law by authorizing the States to impose restrictions on interstate coal pipeline distribution system which conceivably might otherwise be argued unilateral impositions of unreasonable burdens on commerce absent this legislation and to sustain such "State legislation from attack under the Commerce Clause". If a State has granted the necessary water rights under State law for operations to begin for a "national interest" pipeline, or any other interstate pipeline, and then subsequent State action pursuant to applicable State law, alters, restricts, or terminates the operations of the pipeline, this legislation would ensure that such State action would be constitutionally valid. The fact that coal slurry operations in interstate commerce would have begun would not diminish the primary or applicability of State water law to such an interstate coal pipeline distribution system. The continued application and primacy of State water law through any subsequent State action after construction and initial operation of the pipeline cannot be interpreted to be an unreasonable burden on interstate commerce.

This legislation ensures that State water law shall control for the duration of the pipeline operations and shall not be subject to any preemption by application of the Commerce Clause.

In the *Sporhase* case, which concerned the application of a Nebraska statute banning the export of groundwater to another State unless that State has a law granting reciprocal rights to export water into Nebraska, the Court applied a traditional Commerce Clause analysis, involving a balancing between legitimate State interest and its burden on commerce. Utilizing this approach, the Court found that portion of the Nebraska statute requiring reciprocity to be an unconstitutional burden on interstate commerce. In a more recent case, *El Paso* v. *Reynolds,* Civ. No. 80–730 HB (D.N.M. Jan. 17, 1983, the United States District Court for the District of New Mexico, following the holding and analytical approach of *Sporhase,* found a New Mexico statute containing an outright prohibition against the transportation of water from New Mexico to another State to be unconstitutional. The Committee intends that the continued application and vitality of State water law applicable to interstate coal pipeline distribution systems shall not be dependent upon any such Constitutional analysis of the legitimacy of the interests the State is seeking to protect as related to the reasonableness of any burden on interstate commerce which may be imposed by State water law. The Committee has affirmatively considered such Constitutional questions, and by the provisions of the Committee amendment has expressly disposed of them in favor of State water law. In so doing, the Congress will have also, as discussed previously, concluded that existing as well as future State water law applicable to interstate coal pipeline distribution systems shall come under the primacy provisions of this law. Consequently, new State water law statutes or amendments to existing statutes which are applicable to interstate coal pipeline distribution systems, shall be considered to have such primacy under the legislation.

The Committee appreciates that some case law, such as *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S. 152 (1946) has been argued to stand for the legal proposition that Congress has been unsuccessful in laws such as the Federal Power Act in preserving State water law through the statutory provision of savings clauses. The Congressional intent and primary legal theory here is diametrically opposed to any such arguments and analyses. Here, regardless of the body of scholarly legal opinion on the state of existing law in the general issue of State water law under the Constitution, Congress will have enacted pursuant to its Commerce Clause powers, Federal legislation to ensure an express and absolute protection and primacy of State water law for all interstate coal pipeline distribution systems, not merely a legislative "saving" of such laws.

An important element of the Committee amendment's approach to water law is the recognition and preservation of interstate compacts governing the appropriation, purchase, transfer, use, export, or diversion of water. Interstate compacts historically has been the legal vehicle ratifying interstate agreements governing water allocation among several States with interests in a source of water. Such interstate compacts are unaffected by this legislation and are

applicable as a part of State water law to all interstate coal pipeline distribution system. The Committee intends that the legal sufficiency and primacy of any Congressionally approved interstate compacts now in existence or subsequently adopted will be unquestioned despite the enactment of this legislation. Therefore, any interstate coal pipeline distribution system, whether determined to be in the national interest or not, will be subject to any applicable interstate compact governing water appropriation, purchase, transfer, use or diversion, and all such pipelines must be in conformance with such interstate compacts. The Committee believes that interstate compacts are appropriate vehicles for States to use to determined allocations of water among themselves, as well as to ensure that their respective water interests are protected during the construction and operation of any coal slurry pipeline affecting such interests. The Committee encourages the several States who have water availability interests in proposed interstate coal pipeline distribution system to consider the establishment of an interstate compact to ensure the protection of their interests, to the extent they have not already done so.

The Committee also is aware that in cases where no interstate compact exists regarding the allocation of water, or where disputes have arisen under compacts, the courts have allocated or apportioned water. The Committee does not intend to affect, preempt, or invalidate such final judicial decisions by this legislation, either currently in effect or decided in the future.

The Committee-reported amendment thus reflects the Committee's conclusions and intentions with regard to interstate coal pipeline distribution system and the applicability of State water law. The Committee does not intend to imply that the scheme it has adopted here to establish the primacy of State water law is the only one which Congress might adopt to accomplish the same end. The Committee notes in that regard that the House Committee on Interior and Insular Affairs and the House Committee on Public Works and Transportation reported similar legislation in the 97th Congress, H.R. 4230, with related provisions and a similar intent expressed in the respective committee reports (H. Rept. 90-423, parts I and II). In the 98th Congress the House Committee on Interior and Insular Affairs has reported H.R. 1010, again with a similar intent and purpose.

Further, the Committee during its consideration of this legislation necessarily took notice of the general state of the law regarding State water law under the Constitution of the United States, whether or not interstate coal pipeline distribution systems were the direct subjects of Federal action under this legislation. The Committee's action in fashioning the several provisions related to State water law applicable to interstate coal pipeline distribution systems is not intended to be any general Congressional statement, expressed or implied, with regard to State water laws or their primacy in our Federal Constitutional scheme of laws. The Committee has not, and does not, take a position on the validity of any individual State water law in any fact situation other than under this legislation. Further, the Committee expressly reserves its position and any subsequent opinion on the broader issues of State water law in existing law and on the conclusion it might reach with regard to

the applicability of State water laws in other arguable interstate commerce situations. Any such positions and opinions of the Committee should not be inferred from the reported Committee amendment nor this discussion. Neither does the Committee intend to create any implication that Congress is expanding any Federal jurisdiction which may exist regarding water.

The Committee amendment also addresses the use of Federal reserved water in interstate coal pipeline distribution systems in Sections 4(f)(3), 5(c)(9), and 5(d), which are patterned on Section 178 of the Energy Security Act, Public Law 96-294, 94 Stat. 611 (June 30, 1980). These sections make it clear that: (1) an interstate coal pipeline distribution system does not become a Federal project by virtue of the eminent domain authority under section 4 for the purpose of applying for or assigning water rights; (2) the Act does not confer upon any non-federal entity the right to the waters of any stream or underground water resources; and (3) any water to which a Federal right can be asserted may be used for interstate coal pipeline distribution systems only if authorized pursuant to State substantive and procedural law. Clearly the Committee does not intend to create any Federal reserved water right by this Act. Moreover, any existing Federal water right must be authorized in conformance with and subject to State water law.

VII. Section-by-Section Analysis

Section 1—Short Title

Section 2—Findings and Purposes

Section 2(a) sets forth the Congressional findings that provide the factual basis for the legislation. Included in the findings is a determination that the construction of interstate coal pipeline distribution systems is a beneficial public use that justifies granting to any such pipeline the Federal power of eminent domain, if the pipeline is found to be in the national interest.

The findings contained in paragraphs 2(a) (7) through (10) also include a statement of Congressional policy governing the relationship between the need for interstate coal pipeline distribution systems and State water laws, interstate compacts, and laws governing the allocation of water as follows:

> "(7) the water resources of the States are necessary for the development of other resources within those States, and State water laws or terms and conditions of permits and authorizations for the appropriation, use and diversion of water that restrict, limit, or condition the export of water in interstate coal pipeline distribution systems are reasonable and permissible means for the protection of the resources and the public interests of States notwithstanding any adverse impact such law may have on interstate commerce;
>
> "(8) State water law and interstate compacts are carefully balanced and structured systems for the allocation of water;
>
> "(9) the national interest is best served by developing interstate coal pipeline distribution systems pursuant to those State water laws, interstate compacts, and laws governing the interstate allocation of water, including laws relating to or prohibit-

ing the export or use of water within or outside the State granting or denying such export or use, notwithstanding any potential burden on interstate commerce; and

"(10) the need for a national coal distribution system is subservient to the national interest in the primacy of State water law, interstate compacts and laws governing the interstate allocation of water."

The policy articulates that: State water laws are a reasonable and permissible means for the protection of resources of a State based on the Committee's view that the States are the best arbitors of decisions relating to their water resources. The policy also states that State water law and interstate compacts are a carefully balanced system for the allocation of water, that interstate coal pipeline distribution systems must be developed within the context of that system even if a burden on interstate commerce might result, and that the need to develop coal pipelines is subservient to the national interest in the primacy of State water law and interstate compacts concerning water allocation.

In addition, the findings in sections 2(a) (9) and (10) indicate the express intent of the Congress that its authority under the Commerce Clause be delegated to the States in order to establish the primacy of State law over water used for any interstate coal pipeline distribution system. This delegation is effective as to all State water laws, both existing and prospective, including anti-export and reciprocity statutes, as applied to interstate coal pipeline distribution systems.

Section 2(b) contains the purpose of the Act, which is to facilitate the development of interstate coal pipelines by granting the Federal power of eminent domain to those pipelines that are determined to be in the national interest based on certain statutory findings. This objective is expressly, conditioned by statute on, and unequivocably subject to, compliance with State water laws, interstate compacts, and laws governing the interstate allocation of water, through the delegation of Congressional power under the Commerce Clause so as to continued the primacy of State water law and procedures regarding water.

The findings of section 2(a) read in conjunction with the statement of purpose in section 2(b), establish unequivocably that the eminent domain provision in S. 267 is controlled by and wholly subservient to, the primacy of State water law (section 5).

A general discussion of the application of State water law to interstate coal pipeline distribution systems is set forth in the Committee amendment section of this report.

Sectior 3—Definitions

Section 3(1) defines "coal" as any of the recognized classifications of coal, including anthracite, bituminous, semibituminous, subbituminous, and lignite.

Section 3(2) defines "interstate coal pipeline distribution system" in terms of three elements: the entry points and delivery location of the coal; the primary economic purpose of the pipeline; and the physical components of the pipeline system.

Rights-of-way for physical access to water may be obtained through the power of eminent domain granted to an interstate coal

pipeline distribution system under the provision of this bill only after the right of such water has been obtained without the use of the eminent domain authority. As clearly stated in other provisions of the bill, water including any rights or interest therein must be obtained pursuant to substantive and procedural State water law. The right-of-way for physical access to water includes only those facilities and apparatus necessary to delivery operations. Accordingly, any such right-of-way may be obtained, pursuant to section 4. However, the definition does not include any incidental facilities for the delivery of water for uses other than the interstate coal pipeline distribution system. Eminent domain authority for such lateral lines, canals or ditches is not available under this measure, but may be obtained under State law.

Subsection 3(2) allows the Federal power of eminent domain to be used by interstate coal pipeline distribution systems built and operated entirely within the boundaries of Alaska, provided that these pipeline systems meet the criteria set forth in section 4. The following pipelines in Alaska are covered: (1) any coal pipeline that originates in Alaska and moves Alaskan coal to Canada or through Canada and to the lower 48 States; (2) any coal pipeline constructed in Alaska to move Alaskan coal to a facility in Alaska where the coal is loaded aboard a vessel for export to another country, a territory of the United States, or one of the other States of the Union; or (3) in either of the above situations some of the Alaskan coal is used in Alaska. This treatment would apply only for Alaskan pipelines and not for wholly intrastate pipelines in any other State.

The definition of "private lands" in section 3(3) makes clear that the Federal eminent domain power granted in section 4(4) cannot be used to acquire rights-of-way over land owned by the Federal Government or any State or political subdivision thereof, certain lands owned by or held in trust for an Indian or Indian tribe, or certain lands transferred to a regional or village corporation established under the Alaska Native Claims Settlement Act.

Section 3(4) defines "right-of-way" as such interest in private lands, excluding any interests in water, as may be necessary for construction, operation, and maintenance of an interstate coal pipeline distribution system. Thus the right-of-way *per se,* under the bill, would be such land as necessary for construction, operation, and maintenance of the pipeline system. As such, "rights-of-way" would include corridors for the physical apparatus and facilities for the utilization of the water from the point of appropriation to the point of use. (See discussion on section 3(2).)

Section 3(5) is self-explanatory.

Section 3(6) is self-explanatory.

Section 3(7) defines "State water law". It includes existing and future substantive and procedural statutory law, State constitutional provisions, judicial decisions and administrative law which apply to water. The amendment clarifies that State water law which might otherwise be invalid in the absence of this legislation as an impermissible burden on interstate commerce, are not to be deemed invalid insofar as they apply to any interstate coal pipeline system.

Section 4.—Eminent Domain Authority

Section 4 establishes the procedural requirement for the granting of the Federal power of eminent domain to any person proposing to construct an interstate coal pipeline distribution system.

Authority To Make National Interest Determinations

Section 4(a) requires that an application for a interstate coal pipeline distribution system be filed with the Secretary of Energy. Upon receipt of an application, the Secretary is authorized and directed to determine whether the construciton of the proposed pipeline would be in the national interest.

As a precondition to filing an application, each applicant is required to obtain all necessary permits or other authorizations for the use or export of water under applicable State law before the Secretary of Energy can entertain an application for eminent domain. This provision requires acquisition of a water permit or other appropriate authorization rather than acquisition of a perfected water right from a State. Requiring acquisition of a perfected water right would place an eminent domain applicant in an untenable situation, since many States require the completion of construction of works and the application of the water to the intended beneficial use in order to perfect the water right.

It is the intent of the Committee to prevent the simultaneous filing and parallel processing of applications, one for eminent domain authority and one or more for the acquisition of the necessary water supply. Because compliance with State water laws is a condition precedent to obtaining Federal eminent domain authority, such compliance must be demonstrated before the Secretary and Energy commences his review.

Section 4(a)(2) requires that the Secretary, when he makes the "national interest" determination, must base the decision on the record as a whole, and he must take into consideration each of the five criteria prescribed in subsection (4)(b). As discussed subsequently this determination would be subject to title V of the DOE Organization Act as well as section 4(h) of this bill.

Findings

Section 4(b) requires the Secretary of Energy to make findings on five specified criteria in determining whether a proposed pipeline would be in the national interest. The findings would consist of assessments of the extent to which the proposed pipeline would (a) assist in meeting the national demand for coal and the need for an additional mode of coal transportation; (b) enhance competition; (c) contribute to the national security; (d) result in economic benefits, and (e) affect the environment, compared to the environmental impacts of alternatives.

The finding required by subsection 4(b)(5) regarding effects on the environment is intended to encompass only realistic alternatives, such as those specified in that subsection. Moreover, the finding is not intended to serve as a substitute for an environmental assessment or an environmental impact statement, if either should be required. In other words, the National Environmental Policy Act applies by its own terms.

The determination by the Secretary under section 4(a) and the findings under section 4(b) would be by order. The DOE Organization Act, in turn, provides that any rule, regulation or order (with the effect of a rule) issued by the Secretary of Energy shall be subject to the Administrative Procedures Act (APA), unless specific provisions of title V of the DOE Organization Act create exceptions to that requirement. Thus, the Secretary's determination under section 4(a) and his findings as required by section 4(b) would be subject to the APA.

In addition the requirement of section 501(c) of the DOE Organization Act would apply. Section 501(c) requires that with respect to any rule, regulation or order, if it would have a substantial impact on large numbers of individuals or business, or if a substantial issue of fact or law exists, an opportunity for oral presentation of views, data and arguments shall be provided. In addition, section 4(h) requires the promulgation of rules and regulations for the expeditious exercise of the authority granted in section 4.

Small and Independent Coal Producer Access

Section 4(c) requires that an applicant, prior to making an application under subsection 4(a), offer to make available to small and independent coal producers, the lesser of (a) 10 percent of the pipeline capacity or (b) that portion of the capacity of the pipeline necessary to satisfy the needs of all small producers in the geographic region served by the pipeline. The geographic region is determined by the Secretary. Small and independent coal producers are defined as those who produce annually 200,000 tons of coal or less and are not affiliated, as defined, with any other company. The term includes brokers and cooperatives which represent small producers.

Time Limits on Proceedings

Section 4(d) provides for procedures and time limitations on proceedings required for a decision under subsection 4(a). The provisions of section 553 of Title 5 of the United States Code are to be followed. A hearing is not required. However, if the Secretary in his discretion, decides to hold a hearing, it shall be expedited in order that a final decision may be issued within 18 months of receipt of a completed application. The deadline may be extended for good cause for periods of not more than 90 days. Notification of an application must be sent to the Governors of States in which the pipeline system is located. Reimbursement of cost by the applicant is required.

Antitrust Review

Section 4(e) requires the Attorney General to assess the antitrust implications of any application filed with the Secretary of Energy pursuant to section 4(a). Within 120 days after receiving notification of the application, the Attorney General must complete an antitrust review. The review must include an analysis of the likely effects upon competition of approval of the application, and any findings and recommendations concerning terms and conditions deemed necessary to protect and promote competition. As a condition precedent to approval of an application by the Secretary, the

Attorney General must advise the Secretary, in writing, that the application is consistent with the antitrust laws.

Eminent Domain Authority

Section 4(f)(1) authorizes the use of the Federal eminent domain power by any person proposing to build an interstate coal pipeline distribution system if the Secretary of Energy, pursuant to subsection (a), has determined that construction of the pipeline would be in the national interest. The power may only be used after good faith efforts have been made with the private landowner to negotiate acquisition. The applicant is permitted to use either Federal or State courts as the forum for individual eminent domain proceedings. However, this subsection also provides that with two exceptions, any such proceedings shall conform to the laws, practices and procedures relating to the general eminent domain law of the State in which the property is situated. The two exceptions to this requirement relate to any State law, practice or procedure that would have the effect of prohibiting the acquisition of a right of way under this section, or which discriminate against interstate coal pipeline distribution systems. Any such law, practice or procedure would not be applicable to any eminent domain proceeding conducted pursuant to the authority conferred by this subsection.

Section 4(f) (2), (3), and (4) contain limitations on the eminent domain power authorized by subsection (f)(1). Paragraph (2) provides that such power cannot be used to acquire any right to take, use, dispose of, or develop water. Under paragraph (3), the use of the Federal eminent domain power in constructing a project does not transform the project into a Federal project for purposes of the application for, or assignment of, water rights. Paragraph (4) prohibits the acquisition of rights-of-way across private lands of Federal, State or local historic significance, or held by qualified nonprofit organizations primarily for wildlife refuge, sanctuary, recreational or resource conservation purposes, unless there is no feasible or prudent alternative to the acquisition and reasonable planning is made to minimize any harm resulting from the acquisition.

Alternative Routes

Section 4(g) permits a pipeline applicant to amend his application by altering the proposed location of the right-of-way for any segment of the pipeline. Moreover, the Secretary of Energy is authorized to require such relocation if it meets the criteria set forth in the subsection.

Payment for Federal Coal

Section 4(h) requires the Secretary of the Interior to review any application filed pursuant to section 4(a) for the purpose of enhancing the ability of the United States to realize the value of any Federally-owned mineral interest in coal or land to be crossed by the proposed right-of-way. In addition, the Secretary of the Interior is required to take certain specified steps to enhance the recovery of Federal coal, and to establish the fair market value of any Federal coal that cannot be recovered because of the pipeline location, and the reduction of the fair market value of Federal coal which will be more costly to recover because of the pipeline. This section directs

the Secretary of Energy to require the pipeline applicant to pay to the United States the amount established by the Secretary of the Interior.

It is the intent of the Committee that the provisions in this section would not effect the implementation of other Federal land management laws. For example, subsection (h) would not change existing law or procedures with respect to determining the value of a Federal interest in a mineral deposit, authorizing the taking of an interest in land affecting the value of such a Federal interest, or establishing the fair market value of the Federal interest.

Rules and Regulations

Section 4(i) directs the Secretary of Energy to promulgate such rules and regulations as are necessary for the expeditious exercise of the authority granted in section 4. Title V of the Department of Energy Organization Act would apply.

In turn, the DOE Organization Act provides that any rule, regulation or order (with the effect of a rule) issued by the Secretary of Energy shall be subject to the Adminsitrative Procedures Act (APA), unless specific provisions of title V of the DOE Organization Act create exceptions to that requirement. Thus, the Secretary's determination under section 4(a) and his findings as required by section 4(b) would be subject to the APA.

In addition the requirement of section 501(c) of the DOE Organization Act would apply. Section 501(c) requires that with respect to any rule, regulation or order, if it would have a substantial impact on large numbers of individuals or businesses, or if a substantial issue of fact or law exists, an opportunity for oral presentation of views, data and arguments shall be provided.

Section 5.—Primacy of State Water Law

Section 5(a) expressly prohibits any person, legal entity or governmental entity (including the United States and States or local governmental bodies) from controlling, reserving, appropriating, purchasing, transfering, using, diverting, dedicating, disposing of, distributing, acquiring, exercising or claiming water or any right or interest therein, for export for use outside the State granting or denying such export or use for *any* intrastate coal pipeline distribution system, unless such export or use take place pursuant to the substantive and procedural State water law of such State; including laws regarding the protection and enforcement of water rights. State water law is to be enforced even if it means that an interstate coal pipeline distribution system could not be constructed, and even if it results in uneven and disparate effects on interstate commerce. The Committee does not intend to create any implication regarding the primacy of State water law in other areas by its silence.

This language is intended to mean the State water law of the State where the diversion takes place, not where the water resource originates, unless they are one and the same. Nothing in this Act is intended to change the relative rights, if any, between States to shared water resources.

Section 5(b) is a clear and express statement of the intent and policy of Congress, acting in recognition of and pursuant to its

Commerce Clause powers, to delegate to the State the power to regulate the export or use of water in any coal slurry pipeline distribution system, through State water laws, in a manner which would otherwise not be permissible. This delegation expressly includes, but is not limited to, the provisions of State water law which provide for the establishment or exercise of terms or conditions on permits or authorizations for, interests in, or rights to control, reservation, appropriation, purchase, transfer, use, diversion, dedication, disposal, distribution, acquisition, exercise, export or claim of water for the export or use in *any* interstate pipeline distribution system, notwithstanding any adverse impact such delegation may have on interstate commerce or any interstate pipeline distribution system.

The States are authorized by virtue of this section to deny the acquistion or exercise of a water right and to impose restrictions on water use, including terms and conditions terminating use, on any interstate coal pipeline which may be unilateral impositions of otherwise unreasonable burdens on commerce. Such State law is intended to be insulated from attack under the Commerce Clause. The Committee intends this section to be construed broadly.

Section 5(c) provides that this Act shall not impair the validity of or preempt any provision of State water law or of an interstate compact governing the use of water, alter any State's share of surface or ground water as determined by past or future interstate compacts, legislative action or judicial decisions, or preempt any State or Federal law or interstate compact dealing with water quality or disposal. The Committee does not intend to alter the share of water of any interstate watercourse or aquifer to which any State may be entitled or to which any State may be limited by law governing the allocation between states of the waters of an interstate watercourse or aquifier. Subsection (c) also states that this Act does not confer any ability to exercise any Federal water right, nor does it affect rights of any Indian or Indian tribe.

Section 5(d) prohibits any interstate coal pipeline from using water to which a Federal right can be asserted, unless such use is authorized pursuant to State water law.

Section 6—Application of State and Local Law

Subsection 6(a) provides that nothing in this measure shall impair the validity of or preempt in any way the applicability of State water law to interstate coal pipeline distribution systems even if such law prohibits or discriminates against the location, construction, operation or maintenance of such pipelines.

This section does not limit the primacy of State water law under section 5 or the requirements in section 4(a)(1) for State water permits as a condition precedent to an application.

Subsection 6(b) provides that State and local laws and regulations are not preempted by S. 267, unless such laws discriminate against interstate coal pipeline distribution systems. This provision again attempts to strike a balance between (a) the desirability of maintaining State control over facility siting, environmental impacts, and public health and safety matters, and (b) the necessity for insuring that the Federal intent not be frustrated through application of laws which discriminate against interstate coal pipeline distribution systems. This subsection should be contrasted with

subsection 6(a) which provides that State water law will not be impaired or preempted in any way, and subsection 5(h) which, in addition to overriding any discriminatory State eminent domain law, would also override any State eminent domain law, which has the effect of prohibiting the acquisition of a right of way. The exception in section 7(b) provides for application of State laws pertaining to the location, construction, operation or maintenance of interstate coal pipelines even if such application would prohibit the building of such pipeline provided that such application or such State law is not discriminatory.

Section 7—Underground Construction

Section 7 requires the underground construction, to the maximum extent practicable, of interstate coal pipeline distribution systems granted the power of Federal eminent domain under this measure. This section also requires the replacement of topsoil on disturbed areas.

Section 8—Continuing Jurisdiction of State Public Utility Commissions

Section 8 makes clear that this measure does not require State regualtory agencies to approve any type of electric utility rate adjustment mechanism that would permit the automatic pass-through to utility rate-payers of costs related to construction, operation and maintenance of any interstate coal pipeline distribution system. Section 8 also states this measure shall not be construed to prempt the ratemaking authority of any State regulatory commission or the Federal Energy Regulatory Commission. It is the intent of the Committe that the authority of the State regulatory commissions and the Federal Eneryg Regulatory Commission over electric utility rates is neither expanded nor contracted by this legislation. Nothing in this measure mandates, suggests, or contemplates any change in utility rate regulation resulting from the generation of electricity by coal transported through a pipeline.

This section also expressly refers to contracts between electric utilities and interstate coal pipelines, and it provides that the two provisions described shall apply whether or not such contracts obligate utilities to pay costs related to pipeline construction, operation and maintenance. Moreover, if a utility with a long-term contract for pipeline-supplied coal attempts to use a fuel adjustment clause to automatically flow through to its ratepayers escalating coal costs paid pursuant to the contract, such an automatic flow-through will be subject to State regulatory commission review.

Section 9—Limitation on Further Regulation

This section provides that this measure shall not be construed to authorize the further regulation of interstate common carriers, nor shall it be construed to relate to or otherwise affect such regulation.

Section 10—Applicability of Environmental Control Laws

Section 10 explicity states that interstate coal pipeline distribution systems authorized under this measure are subject to the Fed-

eral Water Pollution Control Act, as amended, and other applicable Federal environmental control laws.

Section 11—Water Discharge Requirements Report

Section 11 requires the Secretary to notify the Administrator of the Environmental Protection Agency of his consideration of application. The Administrator is then required to conduct a review of the ability of an interstate coal pipeline distribution system, under subsection 4(c) to comply with Federal water discharge requirements. The Administrator must report to the Secretary, within 120 days of notification of an application, advising that in his judgment the requirements of the Federal Water Pollution Control Act can reasonably be expected to be met. The Committee intends this review and report to be part of the normal environmental review process otherwise required by law. The review and report are not intended to be subject to judicial review prior to a final determination by the Secretary under subsection 4(a), and then, only to the extent that such final determination is reviewable under normal standards applicable to administrative proceedings.

VIII. Cost and Budgetary Considerations

The Committee does not anticipate any significant budgetary impact from enactment of S. 267. There will be some additional administrative costs by the Federal agencies involved, however. And, in the event that Federal lands are crossed by an interstate coal transportation distribution system, there will be additional Federal revenues as compensation for Federal coal.

The Congressional Budget Office cost estimate for this measure follows:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., April 19, 1983.

Hon. James A. McClure,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 267, the Coal Distribution and Utilization Act of 1983, as ordered reported by the Senate Committee on Energy and Natural Resources, April 14, 1983.

The bill is designed to facilitate the interstate distribution of coal. Any person proposing to construct an interstate coal pipeline distribution system, who has secured approval for use of water under State water law, may apply to the Secretary of Energy to acquire the rights-of-way through private land by exercise of the power of eminent domain in the appropriate State court or in the United States district court. To approve such an application, the Secretary of Energy must determine that the pipeline is in the national interest and the Attorney General must find no violations of antitrust laws. In addition, the Administrator of the Environmental Protection Agency must determine whether the water discharged from the pipeline can reasonably be assumed to meet the requirements of the Federal Water Pollution Control Act. Pipeline

applicants are required to pay the Federal Government an amount equal to the fair market value of the coal precluded from being recovered as a result of the proposed right-of-way. The bill provides that use of water for the pipeline shall be in compliance with State law relating to control and use of water. The bill also sets forth certain requirements regarding the construction and operation of the pipeline.

The potential costs to the Federal Government are associated with the processing of pipeline applications. The annual cost will vary with the number of pipeline applications processed. Certification by the Secretary of Energy, the Attorney General, and the Administrator of the Environmental Protection Agency will cost approximately $150,000 per application. The costs incurred by the Secretary of Energy will be offset by fees authorized by this bill. The cost to the Department of the Interior for appraising Federal land within a right-of-way is estimated to be at least $100,000 per pipeline. These costs could be offset by payments to the government for the fair market value of coal precluded from being recovered. Payments will depend on the route of the pipeline and cannot be estimated.

CBO does not anticipate any significant direct effect on the budgets of state and local governments as a result of passage of this bill.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

JAMES BLUM
(For Alice M. Rivlin, Director).

IX. REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out the provisions of S. 267:

The bill is not a regulatory measure in the sense that it would involuntarily impose Government established standards or significant economic responsibilities on private individuals and businesses. Rather, authority is granted for the use of the power of eminent domain if a proposed interstate coal transportation distribution system is found to be in the national interest. The sponsors may voluntarily seek such authority from the Secretary of Energy. Thus, only to the extent that the sponsors voluntarily place themselves under the provisions of S. 267 would they be subject to any regulation.

Some additional paperwork will be required as a result of the bill, but only that as necessary to respond to applications pursuant to section 4, which are expected to be very limited in number.

No personal information would be collected in administering the program. Therefore there will be no impact on personal privacy from enactment of the bill.

X. Executive Communications

On March 9, 1983, the Committee on Energy and Natural Resources requested legislative reports from the Departments of Energy, Interior, Justice and the Office of Management and Budget setting forth executive views on S. 267. These reports had not been received at the time the report on S. 267 was filed. When the reports become available, the chairman will request that they be printed in the Congressional Record for the advice of the Senate.

XI. Additional Views of Senator Hatfield

Chairman McClure and the sponsors of S. 267 are to be congratulated for completing work on S. 267, the Coal Distribution and Utilization Act for 1983. This legislation appropriately protects State interests for control and distribution of water resources and I strongly support the amendments that were added by the Committee. However, I cannot support the legislation at this time because, over time, it may disserve State interests by leaving the interpretation of applicability of State law to the acquisition of pipeline permits governing construction and operation of coal slurry pipelines.

My specific concern lies with Section 7 (application of State and local law) which attempts to protect State and local interests. Section 7(b) prohibits a State or local jurisdiction from exercising any law that "discriminates against interstate coal pipeline distribution systems", while earlier in the same subsection it states that "nothing in this Act shall alter or in any way preempt any State or local law, regulation, or rule of law pertaining to the location, construction, operation or maintenance of an interstate coal pipeline distribution system". While the drafters of this language believe that it protects State interests, I believe the language is subject to multiple interpretations and may lead to a difficult, if not impossible legal finding. Is this language to be construed so narrowly that all existing and future State and local laws shall apply except for a blanket prohibition of coal slurry pipelines? Or is the language to be construed so loosely that pipeline operators would be exempt from say, State environmental laws, if those laws and regulations threaten the construction and operation of coal slurry distribution systems? It is my hope that States will be given the maximum discretion possible in interpreting the application of their laws on coal slurry distribution systems within State boundaries. As drafted, however, the language is subject to multiple interpretations.

Until such time that States have the opportunity to review this matter in detail and comment on the provisions, I am reluctant to support the legislation.

Mark O. Hatfield.

XII. Additional Views of Senator Wallop

Last year for the first time, Congress began to take the issue of water seriously within the context of coal slurry. The Senate Committee on Energy and Natural Resources heard extensive testimony from the foremost water experts in this country, after which it adopted a number of critical water amendments to the then pending coal slurry legislation, S. 1844. Although that bill did not gain final passage, its sponsors embodied these amendments into the subsequent legislation, S. 267, which was introduced earlier this year.

Judicial decisions in the past 10 months, including last July's Supreme Court decision in *Sporhase* v. *Nebraska* (—U.S.—, 102 S. Ct. 1096 (1982)) and a U.S. District Court opinion in *El Paso* v. *Reynolds* (Civ. No. 80-730 HB (D.N.M.J. Jan. 17, 1983)) have raised questions in some people's minds as to whether or not last year's water language is still adequate.

Assistant Attorney General Carol Dinkins addressed this issue in testimony which she gave on September 15, 1982. She stated, in a hearing before the Committee on Environment and Public Works, that in her opinion because of the *Sporhase* decision, the operative language of S. 1844 regarding water "is not, standing alone, free from ambiguity and it is only through the commentary provided in the Committee report which makes the intent of the drafters of this provision completely clear."

It is my intent to eliminate all ambiguity, no matter how minor from this bill. I do not want to leave anything to the imagination of any court in the land.

Mindful of that goal, and together with the cosponsorship of my colleague Senator McClure, I offered a series of amendments to S. 267 which would do just that. These amendments were accepted by the Committee during its markup of the bill and I am committed that these amendments remain as part of the bill.

Generally they insure that:

Whether a pipeline uses eminent domain or not, its use of water falls under the laws of the State where water is sought to be acquired.

Nothing in the law can be interpreted as granting a new right for the Federal Government or its agents to use water.

Federal reserved water cannot be used in a pipeline.

Nothing in the law will alter any State water law or interstate compact.

I offered one additional amendment to the bill which was also accepted by the Committee. This amendment, in the nature of a finding, is a crystal clear Congressional statement that water is to be considered unique because it is necessary to develop the other resources within the States. In recognition of this status, a State can place terms or conditions upon the diversion of water which will

restrict or limit the export of water for coal slurry from within the State. This Congressional statement recognizes a State's right to do this under the Commerce Clause of the U.S. Constitution not withstanding any adverse impact such a law would have on the transaction of interstate commerce.

This clear finding is dramatic evidence that Congress acknowledges the importance of water and in view of this, Congress clearly recognizes that it is in the public interest to vest State officials and legislatures with the power to decide what is the best use for this critical resource.

After the Committee adopted these amendments, the record will show that, on a final vote, I was in the majority on S. 267. This vote was cast only because of the Committee's acceptance of these water amendments. My continued support of this measure is conditional. Its contingency is based upon the inclusion, within S. 267, of a State's unbridled ability to protect its own water resources, an issue that transcends all other aspects of the bill.

MALCOLM WALLOP.

XIII. Minority Views of Senator Warner

Since becoming a member of the Senate over four years ago, I have worked steadily to promote American coal production. Each step towards increased use of domestic coal takes the United States and its allies a step way from dependence on OPEC oil.

I voted against S. 267 because I am not convinced that it is in the best interests of my state—neither the Virginia coal industry nor Virginia consumers.

Virginia is the only State in the Nation with a State statute specifically prohibiting the granting of state eminent domain authority for coal slurry pipelines, and I quote from the statute:

> the right of eminent domain shall not be exercised for the purpose of acquiring any lands or estates or interests therein nor any other property for the construction, reconstruction, maintenance, or operation of any pipeline for the transportation of coal.

In its 1983 session, a committee of the Virginia General Assembly defeated legislation to repeal this prohibition of State eminent domain authority for coal slurry pipelines. Legislation was also defeated which would have given the State Corporation Commission the authority to determine if a coal slurry pipeline should be built in Virginia. Instead, the Virginia General Assembly appropriated $200,000 to study the development of a coal slurry pipeline in Virginia.

The Commonwealth of Virginia is divided on the wisdom of constructing this coal slurry pipeline. The Virginia General Assembly has initiated a major study to resolve these differences and determine what is in the best interests of Virginia.

I am looking forward with great interest to the results of that study which will be available by 1984. While Virginia Electric and Power Company (VEPCO) has financed its own study on the feasibility of a coal slurry pipeline, and the Virginia Railway Association has paid for a critique of the VEPCO study, this new report will be the first not financed by an industry with a direct interest in the pipeline.

The Governor and the General Assembly of Virginia have a strong obligation to act on the recommendations of the Virginia coal slurry pipeline study.

The policy of the Commonwealth of Virginia is reflected in her laws, and current Virginia law remains one of prohibiting State eminent domain for coal slurry pipelines. As the Senator from Virginia, I feel my vote should reflect this State position which is unique in the Nation.

Because of my concern that the small coal mine may be precluded from utilizing a coal slurry pipeline, I co-sponsored, with Senator Ford, an amendment that required 10 percent of a pipeline

to be allocated for small coal mine producers, brokers and cooperatives. However, I am still concerned that this may not be sufficient protection to assure small coal operators access to pipelines.

For these reasons and others, I voted against S. 267.

JOHN W. WARNER.

XIV. Changes in Existing Law

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill (S. 267) as reported.

○